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ABSTRACT

The quality of education being offered by institutions of higher education is being questioned. Trends toward educational quality are evident by court cases that are cited; the issue has been school finance. The equal protection clause of the Constitution has been extended to apply to several areas through the idea of "fundamental rights." The potential right to a certain quality of education is an issue that will continue to be considered in the courts. The notion that equal protection may be translated into an argument for minimum protection is discussed. If inequality is seen as the inability to satisfy certain basic needs, then the idea of equal protection begins to appear as minimum standards to be met rather than merely as consistent application of a particular law. In some states, legislatures have already adopted statutory forms of accountability for educators and public school systems. In other instances, there is a growing movement toward taking school districts into courts in "accountability" actions. When the quality of higher education is questioned, it may be framed in such terms as to make it seem that society is questioning whether an undergraduate education is constitutional. The quality of education has implications for collective bargaining and tenure. (SW)

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UNDERGRADUATE EDUCATION: A LEGAL ISSUE?

by

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Undergraduate Education: A Legal Issue?

In the late 60's, higher education was concerned with the issues of law and student protest. As these issues reached the courts, the issues were clarified into understandable, predictable, and less emotional categories. It was established that students take their constitutional rights to college with them. Free speech is now defined in campus context: it stops at the point of disruption of university functions, denial of free access to buildings, or destruction of property. Now, circumstances around incidents are being decided, not basic issues. Search and seizure actions on campus, as in all other constitutionally protected areas, must be reasonable. Even now guidelines are being established for administrators to follow.

The student unrest issues have established that students can have full due process of law. Campus officials must now be concerned with whether they are arbitrary in their actions. But, the courts have not taken the right to discipline students or curtail harmful student activities.

When the institution's image as a surrogate parent began to erode, new relationships needed to be constructed. An important part of the search for these new associations occurred in court, resulting in the definition of these new relationships.

The concern of this argument is not the constitutional standards of previous years, but the idea of the Constitution which needs to be updated. The relationships have been established; now, what new doctrines will emerge from the Constitution to be impressed on campuses?

Because the Constitution acts as a set of laws, educators are inclined to think of it as a super-statute, used to set standards and be interpreted as any other law. But the Constitution functions as more than law. It is also an idea and a set of principles which carries with it the history and the social aspirations of the American people. Each generation will utilize its own values to give

its own unique content to constitutional principles. The document is more than a useful tool; it is an adaptive idea--continuously adaptable.

The Supreme Court voiced this view when Mr. Justice Holmes stated:

> "The provisions of the Federal Constitution are not mathematical formulas having their essence in form but they are organic, living institutions. Their significance is vital, not formal and is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth."[1]

The direction and line of this organic growth in higher education is indicated by the concern for quality education being offered by institutions. A student can now test the fairness of dismissal or discipline against a constitutional standard. In the near future, he may be able to test the quality of his educational experience against a constitutional standard. Educators have been involved in setting procedural standards for the educational process--the question of substance and quality has been ignored. This question is now being brought to the surface.

Two of the issues identified by the Carnegie Commission's report on The Purposes and Performance of Higher Education in the United States: Approaching the Year 2000 were these:

1. Should higher education be content to offer "equality of opportunity" with differentiated results, or should it be committed to "equality of results"?

2. Does the responsibility of colleges for educating students stop with their intellectual and occupational development? Or does it extend to other aspects of their personalities as well?

The concerns of the campus are shifting to the substantive from the procedural. In the Carnegie Commission report, a concern is expressed about educational quality that sounds much the same as the equal educational opportunity dealt with in the desegregation cases. Can the substitution of "equal quality" be made for "equal opportunity" and then apply the same constitutional standards to create rights to quality that have been applied to established rights of opportunity?

Brown vs. Board of Education, 247 U.S. 483 (1954), and the cases arising from it have been used exclusively as authority to apply the equal protection clause of the Fourteenth Amendment to situations involving segregation, but that case arose out of notions of the quality of education. The court said that, no matter how comparable in facilities and instruction the segregated schools could be made, the black children were still getting an inferior education (it was not of equal quality) and were being denied the equal protection of the laws.

There is some language in Brown vs. Board which is of particular significance to the quality discussion. Mr. Chief Justice Warren said, "In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." But on the facts of the case, he was considering the quality of education--not that it did not exist at all. He proceeded to say: "Such opportunity (substitute 'quality') where the state has undertaken to provide it, is a right which must be made available to all on equal terms." The effect of Brown was in the area of segregation, but its affect was in the realm of quality.

The concern for the quality of education is still evident in American society. As the procedural issues, the question of quality will be increasingly confronted. Already the quality question is being dealt with by the courts. The outlines of the picture are being placed on legal canvas. The issue over which they have been drawn is school finance.

In 1971, the California Supreme Court ruled in Serrano vs. Priest, 5 Cal. 4d 584, 487 P. 2d 1241 (1971), that the disparity in funding among certain school districts, which resulted in spending considerably more on educating a child in one district than in another, was a denial of equal protection of the laws. The quality of a child's education could not be a function of the wealth of his parents or neighbors.

Expectations were voiced that this suit would be as socially significant as Brown vs. Board. In Serrano, the quality of a child's education was being directly addressed. Since this case, nearly forty similar suits have been filed in lower state and federal courts. The immediate expectations of this family of cases were recently dealt a severe setback.

The case of San Antonio Independent School District vs. Rodriguez, 93 S. Ct. 1278, 36 L. Ed. 2d. 16, was brought in a federal district court in Texas. It challenged the constitutionality, under the equal protection clause of the Fourteenth Amendment, of the state's system of financing public education. The basis of the suit was educational quality. Rodriguez won in the district court, but on appeal to the U.S. Supreme Court, the decision was reversed in a five-four decision, holding that the equal protection clause did not apply and that education was not a fundamental right protected by the Constitution. As a result, quality as a constitutional right lost the first round, but left some distinctive sketches for how this picture may eventually be completed. Even while reversing the original decision, Mr. Justice Powell left the door open leading to a quality education argument when he said that, even assuming there were a constitutionally protected quality of education, there was no showing that the system failed to provide it. This suggests that a stronger showing of need might bring the area within constitutional protection.

When the New Jersey Supreme Court considered the same financing issue, it also ruled that the equal protection clause did not apply, but then proceeded to strike down the school district financing inequities on the basis of a state constitutional guarantee of a "thorough and efficient system of public schooling".[2] This decision did not assist the constitutional argument, but it does illustrate the growing concern for educational quality.

From these trends for educational quality, a growing concern in society and in law is evident. These trends will eventually mold the courts, through law,

to their demands. Constitutional law is replete with once controlling doctrines which are now overturned in wake of new evidence, new mores, or new members of the Court.

The meaning of the term "equal protection of the laws" needs to be examined to enable pursuit of the argument further. The fundamental purpose of this section of the Fourteenth Amendment is to make certain that the states will apply the same laws equally to all persons in similar circumstances.[3] Prior to 1960, judicial intervention in the name of "equal protection" was virtually unknown outside racial discrimination cases. Under the Warren Court, the doctrine was specifically expanded into other areas, such as criminal appeals,[4] voting rights,[5] and a few other areas; but the promise of the "new equal protection" seemed limitless. The possibilities seemed to reach to such matters as welfare benefits, zoning, municipal services, and school financing. The basis of the new equal protection was an idea called "fundamental rights". Where this open-ended concept was found, as in the right to vote or the right to a transcript in a criminal appeal, the new equal protection was soon to follow. This is the legacy carried into the investigation of a potential right to a certain quality of education.

The Burger Court has tended to block the expansion of the new equal protection and has currently cut back on what seemed to be fundamental rights. At this time, education has not been determined to be a "fundamental right" under the U.S. Constitution. However, Mr. Justice Marshall, in his dissent in Rodriguez, identifies education as a fundamental right, and his view is supported by many state court cases and much federal court language. The contention is that when (not if) the new equal protection is aired again, one of the first areas in which it will settle to issue will be the one of quality of education.

There is a second development which is significant for consideration. This is the argument that equal protection may be easily translated into an argument

for minimum protection. Equal protection has been thought of as shielding one from discrimination, but there is another side to that coin, one which fulfills what has previously been a deprivation. If inequality is seen as the inability to satisfy certain basic needs or wants felt by all alike, then the notion of equal protection begans to appear as minimum standards to be met rather than merely as consistent application of a particular law. Equal protection turns out to involve "providing for" in accordance with a minimum standard.

Harvard Law Professor Frank Michelman points out that the argument for minimum protection as applied to specific needs and occasions depends on the proposition that justice requires more than a fair opportunity to meet certain needs--that it required that they be met.[6] Minimum protection does not look to inequalities, but for instances in which people have important needs or interests which they are prevented from satisfying because of circumstances which are not a matter of free choice. Such notions of minimum protection are certainly becoming entrenched in our welfare system.

This concern is summed up by Lawrence Hayworth's comment:

> "One is not poor because he has no money, but because he lacks access to social instrumentalities that make socially significant action possible...in larger part, it is not having the character or competence that establishes one's capability of taking up an opportunity that is formally open."[7]

The legal application of the minimum protection concept is at this point very limited, but tenacious when applied. In the criminal procedure cases starting with Griffin vs. Illinois and continuing in numerous following decisions, the court is insisting that, as a matter of constitutional right, a state which subjects a man to criminal prosecution must make certain that he is not prevented, by deprivation, of means to defend himself with full effectiveness.[8]

The same principle is held where the right to vote is involved. "The right to vote is too fundamental to be burdened or conditioned by a payment

requirement"--a poll tax.[9] Here the law was being equally applied--everyone has to pay a certain amount--but the court was saying that there was a minimum protection involved that was so fundamental we could not look to equal application of law to eliminating the deprivation of a fundamental right.

In some states, legislatures have already adopted statutory forms of accountability for educators and public school systems.[10] In other instances, there is a growing movement towards taking school districts into court in "accountability" actions.

One publicized suit was filed in San Francisco in 1973 by a high school graduate with a normal I.Q. who could read only at the fifth-grade level.[11] Other like actions are in progress in several other jurisdictions.

The essential suggestion of this paper is that the issues in higher education are going to move to questions about educational quality and qualities. The outlines of this development have been sketched. When the content begins to be filled in, the tool will be the equal protection clause of the Constitution. That clause will carry the idea given it by society, by which it operates. The approach may be through fundamental rights, minimum protection, or some other device; but the quality question in higher education is due for a confrontation. The issue may well be framed in such terms as to make it seem that society is questioning whether an undergraduate education is constitutional.

The quality of education has some interesting implications. Collective bargaining makes the assumption that all people in an equal position are of equal ability. If the educational quality principle is established, it will be on a collision course with the basic principles of collective bargaining, because the primary question becomes what one has to offer and not how he has been treated. Tenure comes under increasingly heavy attack when the quality of education becomes the dominant objective. In like order, "affirmative action" has a potential conflict with an overriding goal of the quality of education.

Curricula would be reevaluated to determine if they are, in fact, meeting existing needs, both in terms of purely intellectual growth and capacity of the whole person to function adequately in this society. These are the future concerns to be faced by all elements of higher education in the not-too-distant future.

FOOTNOTES

[1] Gompers vs. United States, 233 U.S. 604.

[2] Robinson vs. Cahill, 62 N.J. 473, 303 A. 2d, 273; Sanchez vs. Rafferty, 70 P. 2d. 1633.

[3] Frost vs. Corporation Commission, 278 U.S. 515.

[4] Griffin vs. Illinois, 351 U.S. 12; Pennsylvania Association for Mentally Retarded Children vs. Commonwealth of Pennsylvania, 344 F. Sup. 1257.

[5] Harper vs. Virginia Board of Education, 383 U.S. 663.

[6] Harvard Law Review, Vol. 83:7.

[7] Hayworth, Lawrence, "Deprivation and the City Good", Power, Poverty, and Urban Policy, New York: Harper and Row, 1974, p. 271.

[8] Douglas vs. California, 372 U.S. 353; Anders vs. California, 386 U.S. 738; Draper vs. Washington, 372 U.S. 487.

[9] Harper vs. Virginia State Board of Elections, 383 U.S. 663.

[10] "See You In Court", Saturday Review of Education, October, 1972.

[11] Peter Doe vs. San Francisco Unified School District, 653 S. Ct. 312.

BIBLIOGRAPHY

Blackwell, T. E., College Law: A Guide for Administrators. Washington, D.C.: American Council on Education, 1961.

Carnegie Commission on Higher Education. The Capitol and the Campus. New York: McGraw-Hill, 1971.

_____. The Purposes and Performances of Higher Education in the United States: Approaching the Year 2000. New York: McGraw-Hill, 1973.

Committee on Government Operations, U.S. Senate. Riots, Civil and Criminal Disorders. Washington, D.C.: U.S. Government Printing Office, 1971.

Excerpts from "U.S. Affirmative Action Guidelines", The Chronicle of Higher Education. October 10, 1972.

Fields, Claude, "U.S. Involvement in State Planning Alarms Colleges", The Chronicle of Higher Education. December 18, 1972.

Gehring, D. D. and Young, D. P., Briefs of Selected Court Cases Affecting Student Dissent and Discipline in Higher Education. Athens, GA: Institute of Higher Education, 1970.

Hayworth, Lawrence, "Deprivation and the City Good", Power, Poverty, and Urban Policy. New York: Harper Bros., 1974.

Holmes, G.W. (ed.), Law and Discipline on Campus. Ann Arbor, Mich.: Institute of Continuing Legal Education, 1971.

Keast, W. R., The Commission on Academic Tenure in Higher Education: A Preview of the Report. Paper presented at the annual meeting of the AAUP, January 15, 1973.

Lozier, G. G. and Mortimer, K. P., Collective Bargaining: Implications for Governance. University Park, PA: Center for the Study of Higher Education, 1972.

Moore, W. E., The Professionals: Roles and Rules. New York: Russell Sage Foundation, 1970.

The National Organization on Legal Problems of Education. Current Trends in School Law. Topeka, Kansas: The Organization, 1974.

Newman, F. (Chmn.), Task Force on Higher Education, Report on Higher Education. Washington, D.C.: U.S. Government Printing Office, 1971.

O'Hara, W. T. and Hill, J.G., The Student, The College, The Law. New York: Colombia University, 1972.

Palmer, W. H., "Due Process Termination of Untenured Teachers", Journal of Law and Education, Vol. 1, 1972.

Pierson, G. A., "Competing for Power in Today's Universities", The Chronicle of Higher Education. January 29, 1973.

"Rights and Responsibilities", College Law Bulletin, Vol. 3:67.

"See You in Court", Saturday Review of Education. October, 1972.

Selden, W. K., Accreditation: A Struggle Over Standards. New York: Harper Bros., 1960.

"The Strangely Significant Case of Peter Doe", Phi Delta Kappan. Spring 1973.

Tice, T. H. (ed.), Faculty Power: Collective Bargaining on Campus. Ann Arbor, Mich.: The Institute of Continuing Legal Education, 1967.

Young, D. P., "Due Process Standards and Guidelines for Student Discipline in Higher Education", Journal of College Student Personnel, Vol. 12, 1971.